Supreme Court, U.S.
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No. 95-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LIFE CARE CENTERS OF AMERICA, INC. AND AMERICAN LIFESTYLES, INC.,

Petitioners,

v.

EAST HAMPDEN ASSOCIATES LIMITED PARTNERSHIP, *ET AL.*,

Respondents.

Petition for a Writ of Certiorari to the Colorado Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment permits a punitive damages award of $6 million where the state appellate court refused to conduct meaningful appellate review and, in particular, to consider objective factors such as the closeness of the award and the net worth of the defendant demonstrating the excessiveness of the award.

2. Whether in affirming an award of punitive damages, a state court is obligated by the Due Process Clause of the Fourteenth Amendment to articulate the basis for its conclusion that the award is constitutional.

3. Whether Colo. Rev. Stat. § 13-21-102(1)(a), which limits punitive damages to an amount equal to the compensatory award, makes it unnecessary for the Colorado courts to conduct meaningful appellate review of punitive damages awards.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the court of appeals were plaintiffs-appellants/cross-appellees Life Care Centers of America, Inc. and American Lifestyles, Inc. and defendants-appellees/cross-appellants East Hampden Associates Limited Partnerships, John W. Galston, Eugene H. Rosen, Bruce Weinstein, LPIMC, Inc. and Integon Life Insurance Corporation.

Pursuant to Supreme Court Rule 29.6, Petitioner Life Care Centers of America, Inc. hereby states that it has no parent companies or nonwholly owned corporate subsidiaries. Life Care does, however, hold partnership interests in limited partnerships. None of these limited partnerships are publicly traded.

Pursuant to Supreme Court Rule 29.6, Petitioner American Lifestyles, Inc. hereby states that its parent company is Life Care Centers of America, Inc. American Lifestyles has no nonwholly owned subsidiaries.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE WRIT 8

I. THE DECISION BELOW, WHICH FAILED TO CONSIDER THE OBJECTIVE FACTORS OF CLOSENESS OF THE CASE AND PETITIONER'S NET WORTH, CONFLICTS WITH THIS COURT'S *HONDA* AND *HASLIP* DECISIONS AND WITH THE DECISIONS OF OTHER COURTS. 9

A. The Lower Courts Are In Conflict As To Whether The Closeness Of The Case And Defendants' Net Worth Must Be Considered 11

B. The Lower Courts Are In Conflict As To Whether "Passion-and-Prejudice" Appellate Review Is Constitutionally Adequate. 15

II. THE DECISION BELOW, IN FAILING TO ARTICULATE ANY RATIONAL BASIS FOR THE PUNITIVE EXACTION, IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS 18

CONCLUSION 23

TABLE OF AUTHORITIES

Page

Cases

Adams v. Murikami, 813 P.2d 1348 (Cal. 1991) (en banc) 14

Alexander & Alexander, Inc. v. B. Dixon Evander & Assocs., 596 A.2d 687 (Md. Ct. Spec. App. 1991) 17

Alley v. Gubser Dev. Co., 785 F.2d 849 (10th Cir.), *cert. denied*, 479 U.S. 961 (1986) 12

Arlinghaus v. Ritenour, 543 F.2d 461 (2d Cir. 1976) (per curiam) 21

BMW of North America, Inc. v. Gore, 646 So. 2d 619 (Ala. 1994), *cert. granted*, 115 S. Ct. 932 (1995) . . . 13, 22

Boyle v. Lorimar Prod., Inc., 13 F.3d 1357 (9th Cir. 1994) 18

Butterick Pub. Co. v. Boynton, 77 N.E. 705 (Mass. 1906) 6

Cash v. Beltman North American Co., 900 F.2d 109 (7th Cir. 1990) 15

Clark-Rice Corp. v. Waltham Bleachery & Dye Works, 166 N.E. 867 (Mass. 1929) 6

Coldwell Banker Commercial Group, Inc. v. Camelback Office Park, 751 P.2d 542 (Ariz. 1988) 6

Drabeck v. Stanley-Bostitch, Inc., 997 F.2d 496 (8th Cir. 1993) 12

Dunn v. Hovic, 1 F.3d 1371 (3d Cir. 1993) 15

Eichenseer v. Reserve Life Ins. Co., 934 F.2d 1377 (5th Cir. 1991) 17

Ezzone v. Riccardi, 525 N.W.2d 388 (Iowa 1994) 21

Foley v. Mathias, 233 N.W. 106 (Iowa 1930) 6

Fraidin v. Weitzman, 611 A.2d 1046 (Md. Ct. Spec. App. 1992) 14

Frick v. Abell, 602 P.2d 852 (Colo. 1979) 7, 16

Glasscock v. Armstrong Cork Co., 946 F.2d 1085 (5th Cir. 1991) 17

Gamble v. Stevenson, 406 S.E.2d 350 (S.C. 1991) 19

Garnes v. Fleming Landfill, Inc., 413 S.E.2d 897 (W. Va. 1991) 17, 19, 21

TABLE OF AUTHORITIES (Cont'd)

Page

Gaty v. Sack, 19 Mo. App. 470 (1885) 6
Gumer v. Shearson, Hammill & Co., 516 F.2d 283 (2d Cir. 1974) 19
Hensley v. Eckerhart, 461 U.S. 424 (1983) 19
Hirshhorn v. Bradley, 90 N.W. 592 (Iowa 1902) 6
Hollins v. Powell, 773 F.2d 191 (8th Cir. 1985) 14
Honda Motor Co. Ltd. v. Oberg, 114 S. Ct. 2331 (1994) . . . . . *passim*
Kolender v. Lawson, 461 U.S. 352 (1983) 12, 13
Latham Seed Co. v. Nickerson American Plant Breeders, Inc., 978 F.2d 1493 (8th Cir. 1992) 17
Lemon v. Macklem, 122 N.W. 77 (Mich. 1909) 6
Lunsford v. Morris, 746 S.W.2d 471 (Tex. 1988) 14
Martin Pincus Mktg. v. Sawyer of Napa, Inc., 774 F. Supp. 171 (S.D.N.Y. 1991) 6
Mattison v. Dallas Carrier Corp., 947 F.2d 95 (4th Cir. 1991) 16
Maxey v. Freightliner Corp., 665 F.2d 1367 (5th Cir. 1982) (en banc) 12
McEvoy v. Ginsberg, 189 N.E.2d 546 (Mass. 1963) 6
McGeehan v. Gaar, Scott & Co., 100 N.W. 1072 (Wis. 1904) 6
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) 12
Olympia Hotels Corp. v. Johnson Wax Dev. Corp., 908 F.2d 1363 (7th Cir. 1990) 6
Orijas v. Stevenson, 31 F.3d 995 (10th Cir. 1994) . . . 11, 16
Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) . . . . . *passim*
Palmer v. A.H. Robins Co., 684 P.2d 187 (Colo. 1984) 8, 9, 10, 16
R.G. Nelson, A.I.A v. M.L. Steer, 797 P.2d 117 (Idaho 1990) 6

TABLE OF AUTHORITIES (Cont'd)

Page

Raycarr Sales Corp. v. Herman Rynveld's Son Corp., 147 N.Y.S.2d 425 (Sup. Ct. 1955), *rev'd on other grounds*, 150 N.Y.S.2d 619 (App. Div. 1956) 6
Read Corp. v. Portec, Inc., 970 F.2d 816 (Fed. Cir. 1992) 12
Richards v. Michelin Tire Corp., 21 F.3d 1048 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 902 (1995) 11
SEC v. Chenery Corp., 318 U.S. 80 (1943) 20
Schaffer Transp. Co. v. United States, 355 U.S. 83 (1957) 20
Soneff v. Harlan, 712 P.2d 1084 (Colo. Ct. App. 1985) . . . 6
Southwestern Tel. & Tel. Co. v. Danaher, 238 U.S. 482 (1915) 11
Sprague v. Walter, 656 A.2d 890 (Pa. Super. Ct. 1995) 19, 21
Thompson v. Ferguson & Turnley, 250 S.W. 204 (Tex. Civ. App. 1923) 6
TXO Prod. Corp. v. Alliance Resources Corp., 113 S. Ct. 2711 (1993) . . . . . *passim*

Constitutional Provisions, Statutes and Rules

U.S. Const. Amend. XIV, § 1 2
28 U.S.C. § 1257 2
35 U.S.C. § 284 12
Colo. Rev. Stat. § 13-21-102(1)(a) 8, 20
Colo. Rev. Stat. § 13-21-102(2) 15
Colo. Rev. Stat. § 13-21-102(3) 20
Fed. R. Civ. P. 54(b) 19

Miscellaneous Authority

12 Am. Jur. 2d, *Brokers* § 87 (1964) 6
Brief of Petitioner, *BMW of North America, Inc. v. Gore*, (U.S. March 23, 1995) (No. 94-896) 13

TABLE OF AUTHORITIES (Cont'd)

Page

Brief for Phillips Petroleum Co., *et al.*, as Amici Curiae, *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993) (No. 92-479) 22

Jane Massey Draper, *Excessiveness or Inadequacy of Punitive Damages in Cases Not Involving Personal Injury or Death*, 14 A.L.R.5th 242 (1993) 9

Henry J. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747 (1982) 19

1 James D. Ghiardi & John J. Kircher, *Punitive Damages Law & Practice* § 5.36 (1995) 14

1 *Mechem on Agency* § 1232 (1914) 6

Restatement (Second) of Agency § 394 & cmt. b (1958) . . . 6

Restatement (Second) of Torts § 908, cmt. e (1979) 14

Michael Rustaad & Thomas Koenig, *The Historical Continuity of Punitive Damage Awards: Reforming the Tort Reformers*, 42 Am. L. Rev. 1269 (1993) 15

Seavey on Agency § 151 (1964) 6

Sell on Agency § 135 (1975) 6

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Petition for a Writ of Certiorari to the Colorado Court of Appeals

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PETITION FOR A WRIT OF CERTIORARI

Life Care Centers of America, Inc. and American Lifestyles, Inc. (collectively, "Life Care") respectfully petition for a writ of certiorari to review the judgment of the Colorado Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Colorado Court of Appeals is reported at 903 P.2d 1180. It is reprinted at pages 1a-16a of the appendix to this petition. The Order of the Colorado Supreme Court denying certiorari review is unreported. It is reprinted at pages 17a-18a of the appendix to this petition. The order of the trial court denying Life Care's motion for judgment n.o.v. or new trial is unreported. This order is reprinted at page 19a of the appendix to this petition.

JURISDICTION

The judgment of the Colorado Court of Appeals was entered on March 23, 1995. A timely petition for certiorari in the Colorado Supreme Court was denied on October 2, 1995. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT

This case presents an important and recurring question concerning punitive damages awards that has divided the lower courts: What sort of reasoned analysis must an appellate court conduct when reviewing a jury's punitive damage award to ensure that the award is consistent with Due Process?

Petitioner Life Care Centers of America, Inc.[1] is a Tennessee corporation in the business of managing health care facilities, including nursing homes, retirement centers, and single-illness homes. App. 1a-2a. It operates over 140 facilities in 28 different states. Thirteen are located in Colorado; eight are located in the Denver metropolitan area.

Life Care began managing health care facilities in Colorado in 1981, when it contracted to manage Cherry Creek Nursing Home ("the nursing home") in Aurora, Colorado, a suburb of Denver. App. 2a. The nursing home's owner at that time was a limited partnership, Cherry Creek Medical Investors, Ltd. This contract contained no exclusivity provisions — it did not bar Life Care from managing competing facilities. It specifically recognized that Life Care was "engaged in providing nursing home management and technical services to nursing homes throughout the United States," (Pl. - Appellants' Br., Exh. 1 at 1 (Colo.

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[1] Petitioner American Lifestyles, Inc. is a division of Life Care which, like Life Care, also manages nursing homes and similar facilities. For the sake of convenience, this petition refers to both American Lifestyles and Life Care, collectively, as "Life Care."

App. Dec. 27, 1993)), and it required Life Care to offer the nursing home owner "participation" in Life Care's "national purchasing contracts" so that the owner would benefit from the economies of scale inherent in Life Care's management of multiple facilities. (*Id.*, Exh. 1 at 7). Life Care also informed the investors in the limited partnership that Life Care and its affiliates "have in the past and may in the future engage in other real estate activities, including investments in nursing homes," both as owners and as managers, "which may compete with the Partnership." (Pl. - Appellants' Br. at 4).

In 1987, while Life Care was still under contract to manage the nursing home, ownership of the nursing home passed to respondent East Hampden Associates Limited Partnership ("East Hampden"). App. 1a-2a. In 1989, Life Care undertook to manage two other Denver-area facilities, each owned by affiliates of Life Care, in addition to the nursing home owned by East Hampden. Cherry Creek Retirement Village ("the retirement village") was located on property adjacent to the nursing home. It offered a range of services, including assisted living.[2] Garden Terrace ("the Alzheimer's center") was conceived as a "Mayo Clinic" for the care of individuals with Alzheimer's disease; it was located about four miles from the nursing home. App. 2a. The nursing home offered both assisted living and Alzheimer's care, among other services. Those two new facilities competed with the nursing home in these areas for a year and a half without objection from East Hampden.

In 1990, respondent LPIMC, Inc.[3] became the new general partner of East Hampden. It attained that position by ousting the former general partner in a proxy battle. LPIMC's campaign was largely based on its promise to "renegotiat[e] management

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[2] Assisted living is a service for people who need assistance with daily activities such as walking, meals, and the like, but who desire to live in an independent, home-like environment.

[3] LPIMC stands for Limited Partnership Investment Management Committee.

contracts" or "replac[e]" too-costly managers. (Pl. - Appellants' Br. at 8). LPIMC's effort to keep this campaign promise focused on Life Care. In November 1990, LPIMC wrote its limited partners that it found Life Care's management fee "excessive, and we are investigating ways to reduce it." (*Id.*) When the parties were unable to negotiate an amended contract, LPIMC fired Life Care. App. 2a.

Life Care sued East Hampden and its general partners for damages for breach of the management agreement and tortious interference with contract. App. 2a. LPIMC, East Hampden, and the other defendants counterclaimed that Life Care had breached its contractual and fiduciary duties by managing other facilities. *Id.* Defendants also sought exemplary damages based on Life Care's allegedly improper competition. *Id.*

Before trial, Life Care moved for summary judgment on the ground that no contractual or fiduciary duty existed which prevented Life Care from managing competitors. The trial court agreed that there was no contractual duty to that effect, but disagreed as to the existence of a fiduciary duty, and allowed defendants to proceed with their fiduciary-duty counterclaims based on Life Care's competition.

The evidence at trial established that other entities in the business of nursing home management also routinely managed competing facilities. East Hampden's first general partner, Southmark Partners, operated other nursing homes that competed with the nursing home. Southmark Partners' parent company, Southmark, also represented competitors of the nursing home. Southmark Partners' successor, respondent LPIMC, Inc., also served as a general partner for competing facilities. National Heritage, a management company similar to Life Care, which was hired by LPIMC to supervise Life Care's management of the nursing home, represented at least five competing facilities in the Denver area. So too, the manager hired to replace Life Care also represented competitors of the nursing home.

Nonetheless, on October 27, 1992, the jury returned verdicts in favor of defendants. On defendants' counterclaims, it found

that Life Care's management of competing facilities was a breach of its fiduciary duties, and awarded defendants $6 million for this breach. App. 1a. East Hampden's actual damages were largely, if not wholly, based on its expert's projections of East Hampden's future damages, rather than on damages flowing from competition that had already occurred.

The jury also awarded defendants $6 million in exemplary damages based on this breach, App. 1a, which appears to be the largest amount ever awarded for punitive damages in a Colorado fiduciary-breach case, and the second-largest punitive award ever upheld by the Colorado appellate courts. The $6 million punitive award was the maximum that the jury could have awarded in light of Colorado law prohibiting punitive awards from exceeding the amount of compensatory damages awarded. *Id.* The award at the time also constituted almost 21% of Life Care's $29 million net worth. *See id.* at 15a.

After trial, Life Care moved for judgment n.o.v. on, or a remittitur of, the punitive damages award, *inter alia*, on the ground that the punitive exaction violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Life Care's motion was summarily denied in a one-sentence order: "Plaintiffs' Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial is denied." App. 19a.

On appeal to the Colorado Court of Appeals, Life Care again challenged the punitive award under the Due Process Clause of the Fourteenth Amendment. First, citing *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), Life Care urged the court of appeals that "[a] close appellate review" was necessary in order to satisfy Due Process. (Pl. - Appellants' Br. at 35). Life Care then urged that, in order to comport with Due Process, and with Colorado law, several objective factors required a reduction or elimination of the punitive award: the closeness of the case on the law and facts; the disproportionately large percentage of Life Care's net worth that the damages awards constituted; and the sufficiency of the actual damages award to

serve the goals of punishment and deterrence. (*Id.* at 45-46). East Hampden, quoting *Soneff v. Harlan*, 712 P.2d 1084, 1087-88 (Colo. Ct. App. 1985), opposed by arguing that the jury's determination of punitive damages should not be disturbed "absent a clear abuse of discretion." (Def.-Appellees' Br. at 38 (Colo. App. Feb. 14, 1994)). Life Care also showed that, although Colorado case law had never before addressed this issue, the case law of other states, agency scholars, and the Restatement (Second) of Agency were all uniform in concluding that a nonexclusive agent such as Life Care does not, as a matter of law, breach a fiduciary duty by representing competitors.[4] (Pl. - Appellants' Br. at 12-17).

The court of appeals rejected Life Care's contention that a nonexclusive agent is entitled to manage competitors as a matter

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[4] The case law to this effect includes *Martin Pincus Mktg. v. Sawyer of Napa, Inc.*, 774 F. Supp. 171 (S.D.N.Y. 1991); *R.G. Nelson, A.I.A. v. M.L. Steer*, 797 P.2d 117 (Idaho 1990); *Coldwell Banker Commercial Group, Inc. v. Camelback Office Park*, 751 P.2d 542 (Ariz. 1988); *McEvoy v. Ginsberg*, 189 N.E.2d 546 (Mass. 1963); *Raycarr Sales Corp. v. Herman Rynveld's Son Corp.*, 147 N.Y.S.2d 425 (Sup. Ct. 1955), *rev'd on other grounds*, 150 N.Y.S.2d 619 (App. Div. 1956); *Foley v. Mathias*, 233 N.W. 106 (Iowa 1930); *Clark-Rice Corp. v. Waltham Bleachery & Dye Works*, 166 N.E. 867 (Mass. 1929); *Thompson v. Ferguson & Turnley*, 250 S.W. 204 (Tex. Civ. App. 1923); *Lemon v. Macklem*, 122 N.W. 77 (Mich. 1909); *Butterick Pub. Co. v. Boynton*, 77 N.E. 705 (Mass. 1906); *McGeehan v. Gaar, Scott & Co.*, 100 N.W. 1072 (Wis. 1904); *Hirshhorn v. Bradley*, 90 N.W. 592 (Iowa 1902); and *Gaty v. Sack*, 19 Mo. App. 470 (1885). The commentators include *Seavey on Agency* § 151, at 248 (1964); *Sell on Agency* § 135, at 122 (1975); 1 *Mechem on Agency* § 1232, at 903 (1914); and 12 Am. Jur. 2d, *Brokers* § 87, at 841 (1964). These authorities follow the rule outlined in Restatement (Second) of Agency § 394 & cmt. b (1958). *See also Olympia Hotels Corp. v. Johnson Wax Dev. Corp.*, 908 F.2d 1363, 1374 (7th Cir. 1990) (Posner, J.) ("declin[ing] the invitation to recast hotel contract managers as trustees or guardians of the hotel owners" except when the manager exercises a "traditional fiduciary role, such as the management of bank accounts").

of law. Instead, the court held that to be a jury question dependent entirely on the facts of each case. App. 3a-4a. The court of appeals thus held that there was sufficient evidence to affirm the jury's verdict that Life Care had breached its duty by managing competitors. App. 4a. The court of appeals also affirmed the jury's $6 million exemplary damages verdict as proper under Colorado law, applying the deferential standard of review announced in *Frick v. Abell*, 602 P.2d 852, 854 (Colo. 1979).[5] This holding was based on three pieces of evidence: One, Life Care had competed by seeking new residents for the retirement village from the nursing home; two, Life Care had recommended that the nursing home convert its assisted-living unit to a skilled nursing unit, which would have eliminated the nursing home's competition for assisted-living residents with the retirement village; and three, the Alzheimer's center "competed with Cherry Creek Nursing for patients." App. 14a.

As for Life Care's argument that the award violated the Due Process Clause, the court of appeals seemed to be of the view that any punitive damage award which fell within Colorado's statutory cap (*i.e.*, punitive damages may not exceed actual damages) was *per se* constitutional. App. 15a. The Court's analysis of Life Care's Due Process challenge was but this:

> Life Care argues that the exemplary damages, which it states are in excess of 10% [*sic*; 20%] of its net worth, constitute a disproportionately large percentage of its net worth. We conclude that the award here, which was limited to an amount equal to the compensatory damages awarded on East Hampden's breach of fiduciary duties claim, does not violate the Due Process Clause of the United States Constitution. *See Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 111

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[5] "In reviewing an award of exemplary damages, we must determine 'whether there was sufficient evidence, when viewed in its totality and in the light most supportive of the verdict, to support the jury's finding . . . .' *Frick v. Abell*, 198 Colo. 508, 511, 602 P.2d 852, 854 (1979)." App. 13a.

S. Ct. 1032, 113 L.Ed.2d 1 (1991); *Palmer v. A.H. Robins Co.*, [684 P.2d 187 (Colo. 1984)].

App. 15a. The court thus dismissed the relevance of Life Care's net worth, and it did not even mention Life Care's argument that the closeness of the case (including the novelty of such an award under Colorado law and the law of other states) merited a reduction or elimination of the exemplary award.[6]

Life Care renewed its Due Process challenges in a petition for rehearing in the court of appeals. The court of appeals denied rehearing without opinion.

Life Care petitioned the Colorado Supreme Court for certiorari review, again raising Due Process objections. Review was denied without opinion, Justice Mullarkey dissenting. App. 17a. Justice Mullarkey would have granted certiorari to consider both the fiduciary-duty issue, as well as the question of "[w]hether the court of appeals['] affirmance of the jury's exemplary damages award of $6 million violated Colorado law and due process protections." App. 18a.

REASONS FOR GRANTING THE WRIT

The $6 million in punitive damages awarded by the jury — and affirmed by the trial court and court of appeals — is, to petitioners' knowledge, the second largest such award ever upheld by a Colorado court. The largest such award came in a products liability case against a major manufacturer of drugs and medical devices, and was only $200,000 larger. *Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984). *Palmer* was litigated and appealed before Colorado passed its statutory cap on punitive damages, Colo. Rev. Stat. § 13-21-102(1)(a), which limits a jury's award of punitive damages to the amount of compensatory

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[6] On two issues — Life Care's liability on an unrelated counterclaim, and the proper calculation of prejudgment interest — the court of appeals reversed and remanded for further computations in the trial court. App. 15a-16a.

damages, and which the court of appeals here apparently viewed as making close appellate review unnecessary.[7] The $6 million award here is also, to petitioner's knowledge, the largest amount ever awarded, in any state. for a breach of fiduciary duty outside of the insurance context. *See* Jane Massey Draper, *Excessiveness or Inadequacy of Punitive Damages in Cases Not Involving Personal Injury or Death*, 14 A.L.R.5th 242, at §§ 8-16 (1993) (listing awards).

Despite the unusual and enormous nature of this award, the decision below fails to disclose what, if any, analysis led the court of appeals to sustain this award other than the statutory limit on punitive damages to the amount of compensatory damages. Because the Due Process Clause requires more meaningful analysis than the Colorado Court of Appeals gave, and because this case presents important and recurring questions concerning the standards for reviewing punitive damage awards, this case merits review. In the alternative, because this case raises many of the same issues as *BMW of North America, Inc. v. Gore*, No. 94-896 (argued Oct. 11, 1995), this petition should be held pending the decision in that case.

I. THE DECISION BELOW, WHICH FAILED TO CONSIDER THE OBJECTIVE FACTORS OF CLOSENESS OF THE CASE AND PETITIONER'S NET WORTH, CONFLICTS WITH THIS COURT'S *HONDA* AND *HASLIP* DECISIONS AND WITH THE DECISIONS OF OTHER COURTS.

This Court has considered the problem of arbitrarily excessive punitive damages awards three times in the last five years. *See Honda Motor Co. Ltd. v. Oberg*, 114 S. Ct. 2331 (1994); *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711

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[7] In *Palmer* the punitive award was over ten times the amount of compensatory damages. Had *Palmer* been subject to that statutory cap, the jury's $6.2 million award would have been reduced to $600,000, the amount of compensatory damages awarded in that case. 684 P.2d at 198.

(1993); *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). While these decisions have not yet resolved the "difficult question of what standard of review is constitutionally required," *Honda*, 114 S. Ct. at 2341 n.10, they have plainly established a guiding principle: To protect against arbitrary and excessive punitive damages, such awards must receive meaningful review on appeal. *See id.* at 2338-41; *TXO*, 113 S. Ct. at 2720 (plurality opinion); *Haslip*, 499 U.S. at 20. Nevertheless, the Colorado Court of Appeals in this case did not conduct any meaningful appellate review of the $6 million in punitive damages imposed upon Life Care.

Nothing in the record below suggests that the size of the punitive damages award in this case received meaningful appellate review. The entire discussion of this question is contained in a single, terse paragraph, which failed to address either of the objective factors urged by Life Care — the closeness of the case and the impact of the award on Life Care's net worth.[8] Instead, the court below simply declared:

> We conclude that the award here, which was limited to an amount equal to the compensatory damages awarded on East Hampden's breach of fiduciary duties claim, does not violate the Due Process Clause of the United States Constitution. *See Pacific Mutual Life Insurance Co. v. Haslip*, [499 U.S. 1 (1991)]; *Palmer v. A.H. Robbins Co., Inc.*, [684 P.2d 187 (Colo. 1984)].

App. 15a. At best, the decision below seems to have rejected petitioner's Due Process challenge based wholly upon the statutorily required one-to-one ratio between punitive and compensatory damages — an inquiry which this Court and lower courts have repeatedly "eschewed" as a *sine qua non* under the Due Process Clause. *TXO*, 113 S. Ct. at 2721. The court did

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[8] The court below adverted to Life Care's contention that the award constitutes a disproportionate percentage of petitioner's net worth. It did not even mention the closeness of the case argument against the award.

not even advert to the closeness of the case on the law and facts, including the fact that established norms — as represented in the uniformity of other states' decisional law — allowed nonexclusive agents to compete. Nor did the court below explain why a $6 million punitive award, against a company worth only $29 million at that time, was necessary or appropriate to serve the State of Colorado's interests in punishment and deterrence. *See, e.g.*, *Orijas v. Stevenson*, 31 F.3d 995, 1013 (10th Cir. 1994) (identifying the purposes of punitive damages under Colorado law).

By failing to consider either the closeness of the decision below on the merits or the inordinate percentage of petitioner's net worth the punitive damages award would constitute, the decision below brings Colorado into conflict with numerous other lower court decisions.

A. The Lower Courts Are In Conflict As To Whether The Closeness Of The Case And Defendants' Net Worth Must Be Considered.

1. Closeness of the Case. Several lower courts have recognized that a defendant's notice of the illegality of his conduct is an important factor in assessing the proper amount of punitive damages to impose — where the question of liability is "close" on the law and facts, a defendant cannot be said to have had notice that the conduct in question was impermissible. Indeed, this Court in *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482 (1915), found a penalty excessive and violative of Due Process because the conduct being punished "had the support of repeated adjudications in other jurisdictions." *Id.* at 491. This lack of notice made the penalties "so plainly arbitrary and oppressive as to be nothing short of a taking of its property without due process of law." *Id.*[9] And the Court of Appeals

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[9] Moreover, many courts have held that a defendant's compliance with industry standards or customs either limits or prohibits entirely the award of punitive damages. *See, e.g.*, *Richards v. Michelin Tire Corp.*, 21 F.3d 1048, 1059 (11th Cir. 1994), *cert. denied*, 115 S. Ct. 902

for the Federal Circuit, although its docket does not include "traditional" punitive damages cases, has recognized the importance of the "[c]loseness of the case" in its multifactor analysis for reviewing awards of enhanced damages under the patent laws, 35 U.S.C. § 284. *Read Corp. v. Portec, Inc.*, 970 F.2d 816, 827 (Fed. Cir. 1992).[10] The Due Process Clause prohibits punishing an individual for conduct absent notice of "sufficient definiteness that ordinary people can understand what conduct is prohibited." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see generally Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

In this case, the question of liability was plainly a close one. No Colorado statute or judicial decision prior to this case prohibited a non-exclusive agent from managing facilities owned by competitors of its principal. The commentators and courts in other jurisdictions to have considered the question all agreed that a non-exclusive agent may, as a matter of law, represent competitors of its principal absent an express contractual prohibition. *See supra* p. 6 n. 4.

Thus, not only did Life Care, like the defendant in *Danaher*, act in accordance with the law of most jurisdictions, it also acted in accord with all authority existing at the time of its conduct.

(1995); *Drabeck v. Stanley-Bostitch, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993); *Alley v. Gubser Dev. Co.*, 785 F.2d 849, 856 (10th Cir.), *cert. denied*, 479 U.S. 961 (1986); *Maxey v. Freightliner Corp.*, 665 F.2d 1367, 1378 (5th Cir. 1982) (en banc).

[10] Section 284 of Title 35, United States Code, allows the court in cases of patent infringement to "increase the damages up to three times the amount found or assessed" in certain circumstances, particularly those where the infringement is found to be "willful." The Federal Circuit in *Read Corp.* crafted its § 284 analysis to make it "in line with punitive damage considerations in other tort contexts." 970 F.2d at 827-28. That court also held that lower courts are "obligated to explain the basis for the award, particularly where the maximum amount is imposed." *Id.* at 828.

While punitive damages may be appropriate where "prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct," *TXO*, 113 S. Ct. at 2724 (citation omitted), they are improper where, as here, there is not even a hint that the conduct in question was "tortious." Thus, in this case, not only is the punitive damages award excessive because the question of liability was a close one, but also anything more than a nominal award would be improper because petitioner lacked any notice that its actions would be subject to punishment. *See, e.g., Kolender*, 461 U.S. at 358. Nevertheless, there is no indication that the court below even considered the closeness of the case on liability in affirming the $6 million punitive damages award in this case.

This same issue is present in *BMW*. At issue in *BMW* is the propriety of the company's policy of not disclosing repairs costing less than 3% of a vehicles manufacturer's suggested retail price. *See BMW of North America, Inc. v. Gore*, 646 So.2d 619, 621 (Ala. 1994). Before this Court, BMW has argued, *inter alia*, that it "had no notice that Alabama would consider its application of the 3% disclosure threshold to be punishable misconduct." Brief of Petitioner at 39, *BMW of North America, Inc. v. Gore* (U.S. March 23, 1995) (No. 94-896). In addition, as here, BMW relied upon the fact that the case was a close one because other states had explicitly found its conduct to be permissible. *See id.* at 39 & n.24. Thus, like this case, *BMW* presents the question whether a defendant's conduct is "objectively less reprehensible if the [conduct is] approved in other states." *Id.* at 37.

2. Net Worth. This case also presents the question whether the excessiveness of a punitive damage award should be judged in relation to a defendant's net worth. The $6 million punitive award in this case represented roughly 21% of Life Care's then-net worth of $29 million, yet there is no indication that the court of appeals considered this factor. Instead, it relied solely on Colorado's statutorily required one-to-one limitation of compensatory to punitive damages to dispose of Life Care's Due Process argument.

Net worth is nearly universally recognized as an important factor in determining the appropriate size of a punitive damages award. *See TXO*, 113 S. Ct. at 2722 & n.28 (calling it "well-settled law" that the defendant's financial position is "typically considered"); *Haslip*, 499 U.S. at 21-22. Without that contextual information, a court cannot determine "whether a particular award is greater than reasonably necessary to punish and deter." *Id.* at 22.[11] *See generally Lunsford v. Morris*, 746 S.W.2d 471, 472 & n.2 (Tex. 1988) (noting that 43 states consider a defendant's net worth as a relevant factor in determining the proper amount of punitive damages); *see generally* 1 James D. Ghiardi & John J. Kircher, *Punitive Damages Law & Practice* § 5.36, at 47 (1995) (observing this to be the general rule).[12] Accordingly, courts have held that failure to consider a defendant's net worth would raise serious constitutional concerns, because net worth is necessary to provide a context for evaluating the rationality of a punitive exaction. *See, e.g., Adams v. Murikami*, 813 P.2d 1348, 1352 (Cal. 1991) (en banc); *see also Fraidin v. Weitzman*, 611 A.2d 1046, 1070 (Md. Ct. Spec. App. 1992) (finding punitive damage awards unconstitutional because excessive in relation to defendant's net worth). By failing to consider this factor, the court below departed radically from normal analysis of punitive damages, thereby presenting yet another issue worthy of this Court's review.

Indeed, comparing the punitive award to the defendant's net worth is an even more meaningful comparison than comparing the

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[11] The twin purposes of punitive damages are to "punish for a past event and to prevent future offenses, and the degree of punishment or deterrence resulting from a judgment is to some extent in proportion to the means of the guilty person." Restatement (Second) of Torts § 908, cmt. e (1979).

[12] The percentage of an individual's net worth that would be consumed by a punitive damages award is also significant because the purpose of punitive damages is to punish and deter a defendant, "not to drain . . . his life's blood." *Hollins v. Powell*, 773 F.2d 191, 198 (8th Cir. 1985).

punitive award to the compensatory award. The defendant's net worth must be considered by the court in order to meaningfully evaluate whether a particular punitive award "is greater than reasonably necessary to punish and deter." *Haslip*, 499 U.S. at 22. Even where the same actual damages are caused by two different defendants, the differences in their net worth may require different punitive awards. A punitive award of $6 million on top of an actual damages award of $6 million may not be sufficient to punish and deter a Fortune 500 corporation; but the same awards, if levied against a corporation worth only $29 million, is far "greater than reasonably necessary to punish and deter" except perhaps in the most extraordinary cases.

The typical ratio of punitive damages to a defendant's net worth is around one percent. *See Dunn v. Hovic*, 1 F.3d 1371, 1383 (3d Cir. 1993); *Cash v. Beltman North American Co.*, 900 F.2d 109, 111 n.3 (7th Cir. 1990); Michael Rustaad & Thomas Koenig, *The Historical Continuity of Punitive Damage Awards: Reforming the Tort Reformers*, 42 Am. L. Rev. 1269, 1314 (1993). At the time of the jury's verdict, the award constituted more than 20% of petitioner's net worth. *See supra* p. 5. Given the State's unusually limited interest in both punishment and deterrence in this case, it is plain that the $6 million in punitive damages imposed below is grossly excessive.

B. The Lower Courts Are In Conflict As To Whether "Passion-and-Prejudice" Appellate Review Is Constitutionally Adequate.

The court of appeals here rejected the close appellate review required by *Honda* and *Haslip*, and instead applied Colorado's "passion-and-prejudice" standard of review of punitive damage awards. The lower courts are also divided over whether that sort of review is constitutionally adequate.

Under Colorado law, courts reviewing punitive damages awards are not required to inquire "whether a particular award is greater than reasonably necessary to punish and deter." *Haslip*, 499 U.S. at 22. The Colorado code makes that inquiry discretionary. *See* Colo. Rev. Stat. § 13-21-102(2) (providing

that "the court *may* reduce or disallow the award of exemplary damages to the extent that . . . [t]he purpose of such award has otherwise been served") (emphasis added). The only mandatory inquiry under Colorado law, established long before this Court's decision in *Haslip*, is "whether the punitive damages are so excessive that they shock the judicial conscience or lead to an inescapable inference that they resulted from improper passion or prejudice on the part of the jury." *Orijas v. Stevenson*, 31 F.3d at 1013. *See also Palmer*, 684 P.2d at 220; *Frick v. Abell*, 602 P.2d 852, 854 (Colo. 1979). Under that inquiry, the reasonableness of an award is evaluated simply by "examining the facts of the case to discover if the jury was impermissibly motivated by prejudice or properly guided by the purposes for exemplary damages." *Frick v. Abell*, 602 P.2d at 854. Furthermore, appellate review is limited to determining whether the district court abused its discretion. *See Orijas*, 31 F.3d at 1013; *Frick*, 602 P.2d at 854.

The lower courts are divided over the adequacy of this sort of "passion-and-prejudice" review. The Fourth Circuit has explicitly found such review constitutionally inadequate. In *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991), the Fourth Circuit considered South Carolina's procedures for awarding punitive damages which, like Colorado's, permitted appellate courts to reverse an award only when that award was so "shockingly excessive" as to show that the jury was motivated by passion or prejudice. *See id.* at 100-06. The Fourth Circuit found that this procedure left the jury to "its own devices to take property or mete out punishment to whatever extent it feels is best" and therefore "violates the first principle of due process." *Id.* at 105. In so doing, the Fourth Circuit observed that in *Haslip* this Court distinguished Alabama's detailed standards of review from Vermont's and Mississippi's review procedures, which permitted a punitive damages award to be set aside only if it was "'manifestly and grossly excessive' or would be considered excessive when 'it evinces passion, bias and prejudice on the party of the jury so as to shock the conscience.'" *Id.* (citations and internal quotations omitted). *See also Haslip*, 499 U.S. at 21

n.10).

The West Virginia Supreme Court of Appeals has reached a similar conclusion. Before *Haslip*, that court applied a passion-and-prejudice standard of review. *See Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 908 (W. Va. 1991). However, after *Haslip*, it recognized that such review was inadequate and adopted procedures for appellate review similar to those approved in *Haslip*. *See id.* at 908-10. *See also Alexander & Alexander, Inc. v. B. Dixon Evander & Associates*, 596 A.2d 687, 709-11 (Md. Ct. Spec. App. 1991) (rejecting an abuse-of-discretion standard of review as inconsistent with *Haslip*).

At least two courts of appeals have, however, explicitly found that passion-and-prejudice review is consistent with *Haslip* and with Due Process. In *Eichenseer v. Reserve Life Insurance Co.*, 934 F.2d 1377 (5th Cir. 1991), the Fifth Circuit considered a Mississippi procedure which permitted appellate courts to set aside a punitive damages award only if "it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience." 934 F.2d at 1386 (quotation omitted). In light of the "vigorous examination of the appropriateness of punitive damages" at the district court level, the Fifth Circuit found the narrow review applied on appeal to be constitutionally adequate. *Id.*; *see also Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1098 (5th Cir. 1991) ("We reject Celotex's implication that a 'passion and prejudice' standard of review can never withstand constitutional scrutiny after *Haslip*.") (citation omitted). Following these Fifth Circuit precedents, the Eighth Circuit has also rejected the "contention that a 'passion and prejudice' standard of review cannot satisfy constitutional due process requirements." *Latham Seed Co. v. Nickerson American Plant Breeders, Inc.*, 978 F.2d 1493, 1501 (8th Cir. 1992).[13]

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[13] The Ninth Circuit has also approved appellate review that is nominally directed at passion and prejudice; however, it approved that California standard of review because it, in fact, affords "the same general degree of scrutiny as found in the Alabama review process" — it considers the

Thus, by rejecting Life Care's contention that *Haslip* requires a "close appellate review" of the size of punitive damages award and instead applying, albeit implicitly, Colorado's passion-and-prejudice standard, the decision below deepens the conflict over an issue that already divides the lower courts.

II. THE DECISION BELOW, IN FAILING TO ARTICULATE ANY RATIONAL BASIS FOR THE PUNITIVE EXACTION, IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER COURTS

This Court has explicitly refused to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable" in *Haslip*, one of the very cases cited by the court below. *See* 499 U.S. at 18. Instead, this Court, in *Haslip*, *TXO*, and *Honda*, has repeatedly stressed that the procedural aspects of the Due Process Clause, not bright-line substantive rules, are the primary bulwark against arbitrary and unreasonable punitive damages. *Honda*, 114 S. Ct. at 2335; *TXO*, 113 S. Ct. at 2720; *Haslip*, 499 U.S. at 20.

In all three cases, this Court has emphasized the criticality of close appellate review on appeal. In *Haslip*, this Court upheld Alabama's system for awarding punitive damages because it constrained the discretion of juries through jury instructions, meaningful post-trial review at the trial court level, and appellate review applying detailed substantive standards. *See* 499 U.S. at 19-22. Such vigorous appellate review, this Court found, "imposes a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders" and "makes certain that punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." *Id.* at 20-22. In *TXO*, the plurality found the fact

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same factors as does the jury, and evaluates those factors in light of the policies of punishment and deterrence. *Boyle v. Lorimar Prod., Inc.*, 13 F.3d 1357, 1360 (9th Cir. 1994) (quotation omitted).

that the "award was reviewed and upheld by the trial judge" and affirmed on appeal gave rise "to a strong presumption of validity." *TXO*, 113 S. Ct. at 2720. *See also id.* at 2741-42 (O'Connor, J., joined by White and Souter, JJ., dissenting). And in *Honda*, this Court found that such appellate review of the size of punitive damages awards is a necessary component of due process. *See Honda*, 114 S. Ct. at 2339-42.[14]

To implement this requirement of close appellate review, many state appellate courts have required their trial courts to issue reasoned explanations for upholding punitive awards. *E.g.*, *Sprague v. Walter*, 656 A.2d 890, 928 (Pa. Super. Ct. 1995); *Gamble v. Stevenson*, 406 S.E.2d 350, 354 (S.C. 1991); *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d at 909-10. The principal reason for imposing this requirement is to aid the appellate court in conducting its close appellate review — the same reason that this Court requires district courts, in the context of attorneys' fee awards, "to provide a concise but clear explanation of its reasons for the fee award." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). *See also* Henry J. Friendly, *Indiscretion About Discretion*, 31 Emory L.J. 747, 770 (1982).[15]

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[14] At issue in *Honda* was Oregon's system for awarding punitive damages. Under that system, the safeguards against excessive verdicts were almost entirely at the trial level. Although appellate review was limited to determining whether the evidence was sufficient to support any award of punitive damages, at the trial level punitive damages were limited to a maximum allowable amount, detailed jury instructions given, and clear and convincing evidence required. *See Honda*, 114 S. Ct. at 2341. Nevertheless, finding that juries could ignore these safeguards, this Court held that "Oregon's denial of judicial review of the size of punitive damage awards violates the Due Process Clause of the Fourteenth Amendment." *Id.* (footnote omitted).

[15] The same requirement of a reasoned explanation is found in other contexts as well. When a district court certifies a partial final judgment under Fed. R. Civ. P. 54(b), most appellate courts require a "brief, reasoned statement in support of [the trial court's] determination that 'there is no just reason for delay'" in entering the partial final judgment.

Where the trial court, as here, does not issue any reasons for its decision, the close appellate review is particularly important. In *TXO*, the plurality found that close review in the West Virginia Supreme Court of Appeals' "thorough opinion," 113 S. Ct. at 2724, which carefully analyzed the "reasonable relationship" between the award and the goals of punitive damages, *id.* at 2717-18, "and gave careful attention to the relevant precedents." *Id.* at 2724.

But here, unlike in *TXO*, the appellate court did not conduct anything resembling a "thorough," "careful" appellate review, even though the trial court had not itself conducted a close post-trial review. There is no indication that the Colorado Court of Appeals even attempted to assess whether the punitive damages awarded in this case were reasonable in amount and rational in light of their purposes. Instead, it relied solely upon Colorado's one-to-one limit upon the ratio of punitive to compensatory damages. *See* Colo. Rev. Stat. § 13-21-102(1)(a) (generally limiting punitive damages to the amount of actual damages); *see also id.* § 13-21-102(3) (permitting courts, not juries, to increase punitive damages up to three times compensatory damages in certain cases where aggravating circumstances are present). This, however, is not enough to save every Colorado punitive damage award from unconstitutionality, as the court of appeals here apparently believed.[16] As the procedures utilized below did not

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See, e.g., Gumer v. Shearson, Hammill & Co., 516 F.2d 283, 286 (2d Cir. 1974). And in administrative law, because an agency's determination may only be upheld on the strength of the agency's own rationale, the agency must reveal enough of its own reasoning to permit meaningful judicial review. *SEC v. Chenery Corp.*, 318 U.S. 80 (1943); *Schaffer Transp. Co. v. United States*, 355 U.S. 83 (1957).

[16] The Oregon system found unconstitutional in *Honda* also included a "pre-verdict determination of the maximum allowable punitive damages." *Honda*, 114 S. Ct. at 2341. Nonetheless, because Oregon did not provide for meaningful appellate review of the reasonableness of the amount of punitive damages awarded by the jury, this Court found the Oregon system violative of due process.

provide the close appellate review required by this Court's decisions, the decision below directly conflicts with *TXO*, *Honda* and *Haslip*.

The court of appeals' refusal to provide the close appellate review required by the Due Process Clause also conflicts with the approaches of numerous other courts. In *Sprague v. Walter*, the appellate court, citing *Honda*, held that "the trial and appellate courts of the various states must provide meaningful review of the amount of punitive damages awarded by the jury in any given case." 656 A.2d at 928. In *Garnes v. Fleming Landfill, Inc.*, the West Virginia Supreme Court of Appeals held that its review of punitive damages awards would "consider the same [nine] factors that we require the jury and trial judge to consider." 413 S.E.2d at 910. And in *Ezzone v. Riccardi*, 525 N.W.2d 388 (Iowa 1994), the Supreme Court of Iowa, citing *Honda*, held that "appellate review of the appropriateness of the amount" of punitive damages is required by the Due Process Clause. *Id.* at 398-99. The conflict of these decisions with the approach of the court of appeals in this case provides additional reasons for certiorari review.

There are, moreover, good reasons for requiring meaningful appellate review. Absent an articulation of the rationale behind a punitive award, courts would be free to uphold such awards based upon impermissible reasons — or, as appears to be the case here, no legitimate reasons whatsoever. A statement of reasons also has a disciplining effect on courts: "A decisionmaker obliged to give reasons to support his decision may find they do not; 'the opinion will not write.'" *Arlinghaus v. Ritenour*, 543 F.2d 461, 464 (2d Cir. 1976) (per curiam). Reasoned explanation will also legitimize large punitive exactions in the public eye. But here, the only explanation that Life Care, or the public, has been given for the assessment of this $6 million punitive award is the brief statement of the court of appeals that Life Care has no ground for complaint because the punitive damages did not exceed the compensatory damages. That is barely "process," let alone Due Process.

This problem is endemic. As Justice O'Connor pointed out in her dissenting opinion in *TXO*, "[a]mici recite case after case in which review has been inadequate or absent altogether." *TXO*, 113 S.Ct. at 2742 (O'Connor, J., joined by White and Souter, JJ., dissenting) (citing Brief for Phillips Petroleum Co., *et al.* as *Amici Curiae* at 20-27, *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993) (No. 92-479)).

Indeed, a nearly identical issue is presented by the decision being reviewed in *BMW of North America, Inc. v. Gore*, No. 94-896. In that case, like here, the Alabama Supreme Court approved a $2 million punitive damages award without offering any explanation for the size of the award. *See BMW of North America, Inc. v. Gore*, 646 So.2d at 629 (stating only that "we hold that a constitutionally reasonable punitive damages award in this case is $2,000,000"). Thus, because *BMW* raises the question whether there is an obligation on the part of state appellate courts to explain the size of a punitive damages award, this case should at a minimum be held for the decision in *BMW*.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted. In the alternative, this petition should be held pending decision in *BMW of North America, Inc. v. Gore*.

Respectfully submitted,

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December 29, 1995

APPENDIX

COLORADO COURT OF APPEALS,
DIV. II.

LIFE CARE CENTERS OF AMERICA, INC. and American Lifestyles, Inc.,

Plaintiffs-Appellants and Cross-Appellees,

v.

EAST HAMPDEN ASSOCIATES LIMITED PARTNERSHIP, Cheyenne Associates Limited Partnership, John W. Galston, Eugene H. Rosen, Bruce Weinstein, LPIMC, Inc., and Integon Life Insurance Corporation,

Defendants-Appellees and Cross-Appellants.

Nos. 93CA0222, 93CA0581.

March 23, 1995.

Opinion by Judge PLANK.

Plaintiffs, Life Care Centers of America, Inc., and American Lifestyles, Inc., (collectively, Life Care) appeal the judgment entered on a jury verdict awarding $6 million to East Hampden Associates Limited Partnership (East Hampden) on its breach of fiduciary duties counterclaim, $2 million on its breach of contract counterclaim, $6 million in punitive damages, and the trial court's award of more than $2.1 million in prejudgment interest to East Hampden. Life Care also appeals the jury's rejection of its breach of contract claim against East Hampden, Cheyenne Associates Limited Partnership (Cheyenne), LPIMC, Inc., the general partner of East Hampden and Cheyenne, and the officers of LPIMC, John W. Galston, Eugene H. Rosen, and Bruce Weinstein. We affirm in part, reverse in part, and remand with directions.

In 1987, East Hampden purchased a nursing home, Cherry Creek Nursing Center (Cherry Creek Nursing). At that time, Cherry Creek Nursing primarily offered skilled nursing care but also provided assisted living services and specialized care for persons suffering from Alzheimer's disease. One of East

Hampden's predecessors in interest had contracted with Life Care to manage Cherry Creek Nursing, and Life Care continued to manage the facility after it was purchased by East Hampden. Pursuant to this management agreement, Life Care was responsible for the day-to-day operations of Cherry Creek Nursing.

Life Care was also the managing agent for Cheyenne Place Retirement Center (Cheyenne Place) and the Cheyenne Mountain Nursing Center (Cheyenne Nursing), which were owned by Cheyenne. Cheyenne Place offered an independent living environment for retired persons and Cheyenne Nursing offered assisted living services and skilled nursing care.

During Life Care's management of Cherry Creek Nursing, Life Care's chairman of the board and sole shareholder, Forrest Preston, helped develop two facilities, Cherry Creek Retirement Village (CCRV) and Garden Terrace, in which he had an ownership interest. Life Care was also retained as the managing agent for both of these facilities. CCRV was constructed on land adjacent to Cherry Creek Nursing and offered assisted living services and independent retirement living. Garden Terrace was located a few miles from Cherry Creek Nursing and specialized in the treatment of Alzheimer's disease.

In April 1991, East Hampden terminated its contract with Life Care based on its conclusion that Life Care had fiscally mismanaged Cherry Creek Nursing and had misappropriated key business opportunities by its operation of CCRV and Garden Terrace. In addition, Cheyenne terminated its relationship with Life Care with respect to the two facilities it owned.

Life Care initiated this action against both East Hampden and Cheyenne for breach of contract. East Hampden and Cheyenne filed counterclaims against Life Care for breach of its fiduciary duties and East Hampden filed a counterclaim for breach of contract based on Life Care's failure to maximize Medicare reimbursement and its failure to seek Medicaid certification for Cherry Creek Nursing. After an 11-day trial, the jury found

against Life Care on its breach of contract claims and in favor of East Hampden and Cheyenne on their counterclaims.

I.

Life Care contends that its management of other long-term care facilities in the Denver area was not, as a matter of law, a breach of its fiduciary duties to East Hampden. We are not persuaded.

A.

The relationship between Life Care and East Hampden was governed by the management agreement that East Hampden's predecessor in interest had entered into with Life Care. This agreement provided that Life Care was to be the agent of the owner of Cherry Creek Nursing. Furthermore, at trial, Preston testified that Life Care was an agent of East Hampden and that Life Care owed East Hampden duties of trust, loyalty, honesty, a duty to look after the best interests of East Hampden, and a duty to maximize the profits of Cherry Creek Nursing.

Life Care tendered an instruction, given to the jury, based on *Restatement (Second) of Agency* § 393 (1958). This instruction provided:

> It is a breach of fiduciary duty to compete with [the] principal with respect to the subject matter of the agency unless the principal understands that the agent is to compete or a course of dealing between the agent and the principal indicate that this is understood.

B.

Initially, we reject Life Care's contention that it did not breach its fiduciary duties to East Hampden because it was not East Hampden's exclusive agent.

Life Care relies on *Restatement (Second) of Agency* § 394 comment b (1958) which provides:

> The agent commits no breach of duty by acting for competitors if, at the time of his employment, the principals have reason to know that the agent believes that he is privileged to do so.

Life Care further asserts that the following illustration, set out that *Restatement* comment, is on "all fours" with this case:

> P, a manufacturing company, enters into a contract with A, another corporation, the business of which is representing manufacturers. By terms of the contract A is to have the exclusive agency to sell P's products. A makes other similar contracts with competing manufacturers. In the absence of further facts, A thereby commits no breach of duty to P.

Life Care did not submit an instruction based on these authorities to the trial court. Moreover, as these authorities make clear, the determination of the nature and scope of an agency relationship is inherently factual.

The evidence concerning the relationship between East Hampden and Life Care was extensive and at times conflicting. The mere fact that East Hampden may have known that Life Care operated other health care facilities in the Denver area was not dispositive as to whether Life Care breached its fiduciary duties to East Hampden. Life Care could have operated other long-term care facilities in the Denver area in such a manner that it did not breach these duties.

Therefore, under these circumstances we cannot determine, as a matter of law, that Life Care did not breach its fiduciary duties to East Hampden.

C.

Next, we reject Life Care's argument that it did not breach its fiduciary duties to East Hampden because East Hampden consented to the competition.

The evidence concerning what East Hampden knew and whether it had consented to Preston's development of CCRV and Garden Terrace and Life Care's management of these facilities

was disputed. The jury, in concluding that Life Care breached its fiduciary duties to East Hampden, implicitly rejected Life Care's arguments that East Hampden had agreed to or consented to Life Care's management of CCRV and Garden Terrace. The jury's conclusion is supported by the record and, accordingly, will not be disturbed on appeal. *See Nutting v. Northern Energy, Inc.*, 874 P.2d 482 (Colo.App. 1994).

D.

We also reject Life Care's contention that the trial court erred in failing to instruct the jury, as an affirmative defense to East Hampden's breach of fiduciary duties counterclaim, that there was an understanding or a course of dealing between the "original owner" of Cherry Creek Nursing and Life Care that Life Care could manage "other facilities" in Denver.

The instruction tendered by Life Care was based on *Restatement (Second) of Agency* § 393 comment a (1958) which provides that:

> There is no violation of the agent's duty if the principal understands that the agent is to compete; a course of dealing between the parties may indicate that this is understood.

In rejecting Life Care's tendered instruction, the trial court stated that:

> This is not a course of dealing case. It's a case about notice and estoppel, and that's the way it's been tried and that's the way it will be presented to the jury.

We agree that the trial court properly rejected Life Care's tendered instruction as it was incorporated in other instructions given by the court. The trial court, as noted previously, gave Life Care's tendered instruction that an agent does not breach its fiduciary duties if the agent competes with the principal and "the principal understands that the agent is to compete or a course of dealing between the agent and the principal indicate that this is understood." (emphasis added) The jury was also instructed that: "One who is assigned the rights under a contract stands in the

same position as the assignor and has no better rights than the assignor."

Based upon these instructions, if the jury determined that the "original owner" of Cherry Creek Nursing had consented to or agreed to competition, it necessarily would have found that East Hampden assumed the management agreement subject to such consent. Therefore, under these circumstances, the trial court did not err by not submitting Life Care's tendered instruction to the jury.

II.

Life Care also contends that the trial court erred in allowing East Hampden and Cheyenne to assert as an affirmative defense to its breach of contract claim Life Care's solicitation of the limited partners of each partnership. Under the circumstances presented here, we disagree.

At the outset, we will consider the propriety of the solicitation defense as to Cheyenne Nursing only. Unlike Cheyenne Place and Cherry Creek Nursing, for which the jury found against Life Care on other affirmative defenses, the solicitation defense was the sole affirmative defense asserted by Cheyenne Nursing to Life Care's breach of contract claim.

Life Care began soliciting the limited partners of Cheyenne in the summer of 1991 to obtain their consent to replace LPIMC with itself as the managing general partner. On July 15, 1991, LPIMC informed Life Care that it was terminating the management agreement effective July 22, 1991, as a result of Life Care's breach of its contractual and fiduciary obligations owed to Cheyenne by its solicitation of the limited partners and its failure to cure within a reasonable time.

In determining what fiduciary duties Life Care owed Cheyenne with respect to its solicitation of the limited partners, the trial court relied on *Treadway Cos. v. Care Corp.*, 638 F.2d 357 (2d Cir. 1980). In *Treadway*, two directors of Treadway, which was targeted for takeover by Care Corporation, were also officers in Care Corporation. The court held that the directors did not

breach their duties of loyalty to Treadway by seeking a change in the incumbent management because there was no actual conflict between the interests of the two companies and the takeover was not adverse to the best interests of Treadway.

The trial court, relying on *Treadway*, substantially adopted Life Care's argument on summary judgment concerning the solicitation issue, ruling:

> Just as the agent of a corporation generally owes a duty to the corporation (including management) and its shareholders, the agent of a limited partnership owes a duty to the limited partnership (including its managing general partner) and its limited partners.
>
> However, the Court finds that in the event that the interests of the partnership's incumbent management and its limited partners conflict, an agent, in an attempt to serve the best interests of the partnership and its limited partners, may take action which may not be in the best interest of present management.

Upon an expedited motion for reconsideration of its decision granting summary judgment in favor of Life Care on the solicitation issue, the trial court reversed its ruling finding that material questions of fact were present regarding: (1) whether a conflict existed between the LPIMC and the limited partners of Cheyenne; and (2) whether Life Care was seeking to serve the best interests of Cheyenne.

Life Care subsequently argued that the sole issue that should be submitted to the jury was whether its solicitation of the limited partners was in the best interests of the partnership. Life Care objected to the additional requirement that there be a conflict of interest between the general partner and the limited partners at the time the solicitation was made.

Life Care, however, tendered an instruction that was ultimately given to the jury. This instruction followed the trial court's ruling on summary judgment and provided:

> In the event that the interests of a partnership's incumbent management and its limited partners conflict, an agent, in an attempt to serve the best interests of the partnership and its limited partners, may take action which may not be in the best interests of incumbent management. In a limited partnership, it is the general partner(s) which manages the partnership.

Subsequently, during the hearing on instructions, Life Care reiterated its prior objections, in essence objecting to its own tendered instruction. Thus, even if we agree with Life Care's position on appeal that the trial court impermissibly added an additional requirement, we conclude that Life Care by its summary judgment position and by tendering the instruction set forth above was precluded from any objection it may have had to the added element that there be a conflict of interest between the general and limited partners. *See Caldwell v. Kats,* 193 Colo. 384, 567 P.2d 371 (1977) (even if verdicts were inconsistent, they were permitted under instructions submitted by parties, so judgment will not be reversed).

Therefore, the trial court did not err in permitting Cheyenne Place to raise Life Care's solicitation as an affirmative defense and in instructing the jury as set forth above.

III.

Life Care asserts that the awards for compensatory damages are not supported by sufficient evidence of causation, are duplicative, and are improper because the awards include damages for the period after East Hampden terminated the management agreement with Life Care and after Life Care could have unilaterally terminated the contract. We agree in part.

A.

Life Care first contends that East Hampden failed to show adequate causation of damages. We disagree.

To recover damages for future lost profits, the party seeking such damages must establish with reasonable, but not necessarily mathematical, certainty both the fact of the injury and the amount

of the loss. Sufficient evidence must be presented to compute a fair approximation of the loss. *Pomeranz v. McDonald's Corp.*, 843 P.2d 1378 (Colo. 1993). Lost profits may not be awarded if they are speculative, remote, imaginary, or impossible to ascertain. *Western Cities Broadcasting, Inc. v. Schueller,* 849 P.2d 44 (Colo. 1993). The damages awarded must be "traceable to and [must be] the direct result of the wrong to be redressed." *Graphic Directions, Inc. v. Bush,* 862 P.2d 1020, 1025 (Colo.App. 1993).

East Hampden presented testimony on damages, in part, through an expert witness in the field of economic analysis and the financial aspects of the nursing home industry. In determining the damages East Hampden incurred because of competition from CCRV and Garden Terrace, East Hampden's expert testified that he calculated the amount of net income that each patient generated based on the historical records of Cherry Creek Nursing regarding revenues and costs. He then estimated the number of patients that Cherry Creek Nursing would lose as the result of continued competition from CCRV and Garden Terrace and calculated the total damages by multiplying that number with the net income per patient.

Life Care contends that these calculations were deficient because the assumptions relied upon by East Hampden's expert failed to establish causation. In addition, Life Care asserts that East Hampden's expert failed to account for the undisputed benefit of having CCRV next door, failed to account for property-related expenses, and erroneously assumed that East Hampden was entitled to recover all damages resulting from any decline in the number of Alzheimer and assisted-living patients at Cherry Creek Nursing solely from Life Care. We are not persuaded that these alleged errors require reversal.

Because the damages calculations were based on historical revenues and costs, and because the underlying assumptions concerning patient loss, growth rates, and the effects of adverse competition from CCRV and Garden Terrace have support in the record, we conclude that the calculations are reasonable and could

be determined by the jury to be a valid means for determining damages.

B.

Life Care next contends that the jury's award of damages on East Hampden's Medicaid certification counterclaim are duplicative. We agree.

East Hampden's own expert on damages testified that the damage calculations for the breach of fiduciary duties and Medicaid certification counterclaims were mutually exclusive. He stated that, if Life Care had not competed for patients, there would not have been a need for Life Care to recommend Medicaid certification and, hence, no damages on the Medicaid claim would have been appropriate.

We reject East Hampden's argument that Life Care waived any objection because it did not request an instruction that, if the jury awarded damages on the breach of fiduciary duty counterclaim, it was not to award damages on the Medicaid counterclaim. Because the award is without support in the record, we conclude that Life Care did not waive its right to object to these damages.

We also reject East Hampden's argument that if the jury awarded the low range estimate of damages, the damages awarded were not duplicative of the Medicaid damages. That argument is also without support in the record.

East Hampden's expert did not testify that, in the event the jury awarded the low range estimate of damages, it would have been appropriate for it also to award damages for Life Care's alleged failure to recommend Medicaid certification. East Hampden's expert stated that the medium range estimates represented East Hampden's actual damages. The low and high range estimates were merely posited to show the jury the effect of varying the number of projected patients at Cherry Creek Nursing for future years.

Because there is no support in the record for the jury's award of damages on both claims, the award of damages for the Medicaid counterclaim must be reversed. Because we are unable to determine what portion, if any, of the jury's award of $2 million on East Hampden's counterclaims for breach of contract is for Medicare reimbursement, we must remand for a new trial on that issue.

C.

Life Care contends that the awards for compensatory damages are improper because they include damages for the period after East Hampden terminated the management agreement with Life Care. We disagree.

Life Care argues that, under *Restatement (Second) of Agency* § 396(a) (1958), it was free to compete with Cherry Creek Nursing after April 8, 1991, the date East Hampden terminated the management agreement, and thus, no damages should have been awarded for the period following termination. Alternatively, Life Care argues that East Hampden, at most, should be allowed to recover damages through March 9, 1993, at which point Life Care had the sole option to terminate the management agreement. We find no merit in either argument.

Restatement (Second) of Agency § 396(a) (1958) provides that:

> Unless otherwise agreed, after the termination of the agency, the agent:
>
> (a) has no duty not to compete with the principal. . . .

This rule finds support in *Restatement (Second) of Agency* § 393 comment e (1958) which provides that after the agency relationship has been terminated, "the agent can properly compete with his principal as to matters for which he has been employed."

Although these *Restatement* provisions set out the general rule, when, as here, it is the agent's breach of fiduciary duties that was the cause for the termination, the agent should not be able to benefit from the termination by being able to compete

immediately with the principal. *See* W. Sell, *Agency* § 138 at 124-125 (1975); 3 *C.J.S. Agency* § 287 at 73 (1973) (an agent is not "permitted to terminate an agency in bad faith in order to take advantage of his principal's condition or to profit by information resulting from his agency."). Hence, the award of damages for the period after April 8, 1991, was proper.

We also reject Life Care's contention that East Hampden's damages should be limited to the period through March 9, 1993, at which time the management agreement would have expired unless Life Care had exercised its sole option to renew for an additional five-year period. If we accepted Life Care's argument, a party could act with impunity at the end of a contract term knowing that its actions would be without consequence. The inequity of Life Care's argument is further illuminated by the fact it sought damages for East Hampden's breach of contract for the entire five-year renewal term. While we acknowledge that Life Care had the sole option to renew the agreement and East Hampden could only terminate the agreement for cause, Life Care cannot have it both ways.

Therefore, we agree with the trial court's conclusion that East Hampden was entitled to damages for the same period that Life Care itself sought damages.

D.

Life Care further contends that East Hampden was improperly allowed to seek recovery of the management fees that it would have earned because of its management of the competing facilities. Life Care did not raise this issue in the trial court, nor did it object to the jury being instructed that, in determining damages, it could consider not only any economic loss of East Hampden but "anything of value or any profit Life Care or American Lifestyles received as a result of Life Care's breach of fiduciary duty."

Having failed to protest, Life Care has waived any objection to the jury being so instructed and, because the jury's award of $6 million was less than what East Hampden sought for its

economic losses, it is permissible to infer that the jury did not award East Hampden any of Life Care's management fees.

V.

Life Care further asserts that the exemplary damages award should be reversed because it is not supported by sufficient evidence that Life Care's actions were malicious or willful and wanton beyond a reasonable doubt and are improper under Colorado law and the Due Process Clause of the United States Constitution. We reject both arguments.

A.

An award of exemplary damages is controlled by statute. The relevant statute provides that exemplary damages are proper only if the evidence shows that the actions that caused the injury are "attended by circumstances of fraud, malice, or willful and wanton conduct." Section 13-21- 102(1)(a), C.R.S. (1987 Repl. Vol. 6A). The amount of exemplary damages must be reasonable and cannot exceed an amount which is equal to compensatory damages, § 13-21-102(1)(a), and are to be awarded only if they are proved beyond a reasonable doubt. Section 13-25-127(2), C.R.S. (1987 Repl. Vol. 6A).

In reviewing an award of exemplary damages, we must determine "whether there was sufficient evidence, when viewed in its totality and in the light most supportive of the verdict, to support the jury's finding. . . ." *Frick v. Abell,* 198 Colo. 508, 511, 602 P.2d 852, 854 (1979).

Here, when viewed in a light most supportive of the verdict, there was ample evidence to support the jury's award of exemplary damages. In particular, there was evidence that Life Care was actively seeking to recruit patients at Cherry Creek Nursing for the assisted-living program at CCRV. The marketing director of CCRV prepared a memorandum in which she stated: "I found at least 35 very good prospects for our retirement community on the second floor of [Cherry Creek Nursing]."

Furthermore, after CCRV opened, Life Care proposed that East Hampden convert the assisted-living unit to a skilled nursing unit. Life Care made this proposal even though its regional vice president testified that he was opposed to the idea. In addition, Preston, in a letter to the general partner of Cherry Creek Nursing shortly after CCRV opened, reiterated this plan, stating that:

> The time has now come to do the conversion and to place many of the people who would rather be in the retirement center setting next door at the new Cherry Creek Retirement Village. As you are aware, I have a personal interest in the retirement center; however, I feel like it is quite unfair to the partnership owning Cherry Creek Nursing Center to not divulge that many of the residents in the assisted living unit wish to be moved or have already moved because families feel that the retirement center environment is more of their choosing.

He also stated, in a blind copy of this letter to the president of Life Care, that:

> The financial impact on the nursing center could be considerable unless this is properly handled with the renovation and modification of the assisted living units.

The evidence also showed that the opening of Garden Terrace adversely impacted the number of Alzheimer patients at Cherry Creek Nursing. Several witnesses testified that Garden Terrace competed with Cherry Creek Nursing for patients. Garden Terrace hired the marketing director for Cherry Creek Nursing as its marketing director. In addition, there was evidence that approximately 50% of Cherry Creek Nursing's Alzheimer patients moved to Garden Terrace. As a result of the decline in patients, Cherry Creek Nursing closed one of its Alzheimer units. We conclude that this evidence is sufficient to support an award of exemplary damages under the statutory standard. *See Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984).

B.

We also reject Life Care's contention that the award of exemplary damages violates the Due Process Clause of the United States Constitution. Life Care argues that the exemplary damages, which it states are in excess of 10% of its net worth, constitute a disproportionately large percentage of its net worth. We conclude that the award here, which was limited to an amount equal to the compensatory damages awarded on East Hampden's breach of fiduciary duties claim, does not violate the Due Process Clause of the United States Constitution. *See Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991); *Palmer v. A.H. Robins Co., supra.*

VI.

Lastly, Life Care asserts that the trial court misconstrued s 5-12-102, C.R.S. (1992 Repl.Vol. 2), and erred in awarding East Hampden $2.1 million in prejudgment interest on the damages awards. We agree.

In *Shannon v. Colorado School of Mines*, 847 P.2d 210, 213 (Colo.App. 1992) a division of this court stated: "Section 5-12-101 specifically awards interest on money which is due and owing prior to the date of payment or prior to the date of judgment." (emphasis added) The court then concluded that: "Thus, under § 5-12-101, interest may not be awarded on lost future wages and benefits because they are not due and owing prior to the entry of judgment." *Shannon v. Colorado School of Mines, supra* at 213 (emphasis in original). That holding is dispositive of the issue here.

Here, the trial court awarded prejudgment interest on past and future damages. Therefore, we conclude the trial court's award of prejudgment interest must be reversed and an award of prejudgment interest entered on only those damages incurred prior to the entry of judgment.

That part of the judgment awarding $2 million on East Hampden's counterclaims for breach of contract is reversed, and

the cause is remanded for new trial on that claim. That part of the judgment awarding prejudgment interest is reversed, and the cause is remanded for an award of interest consistent with this opinion. The remainder of the judgment is affirmed.

STERNBERG, C.J., and HUME, J., concur.

SUPREME COURT, STATE OF COLORADO

CASE NO. 95SC315

CERTIORARI TO THE COLORADO COURT OF APPEALS,

93CA0222 & 93CA0581

DISTRICT COURT, CITY AND COUNTY OF DENVER,

91CV2410

ORDER OF COURT

LIFE CARE CENTERS OF AMERICA, INC., a Tennessee corporation, and AMERICAN LIFESTYLES, INC., a Tennessee corporation,

Petitioners,

v.

EAST HAMPDEN ASSOCIATES LIMITED PARTNERSHIP; CHEYENNE ASSOCIATES LIMITED PARTNERSHIP; JOHN W. GALSTON; EUGENE H. ROSEN; BRUCE WEINSTEIN; LPIMC, INC.; and INTEGON LIFE INSURANCE CORPORATION,

Respondents.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the judgment of said Court of Appeals.

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, OCTOBER 2, 1995.

JUSTICE MULLARKEY would grant as to the following issues:

Whether the court of appeals erred in rejecting Life Care's argument that its management of other long-term care facilities was not, as a matter of law, a breach of its fiduciary duties to East Hampden.

Whether the court of appeals erred in allowing the jury to award compensatory damages for the period after East Hampden terminated the management agreement with Life Care.

Whether the court of appeals affirmance of the jury's exemplary damages award of $6 million violated Colorado law and due process protections.

[seal, Supreme Court,
State of Colorado]

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

District Court No. 91 CV 2410 Courtroom 20

ORDER

LIFE CARE CENTERS OF AMERICA, INC., a Tennessee corporation, and AMERICAN LIFESTYLES, INC., a Tennessee corporation,

vs.

EAST HAMPDEN ASSOCIATES LIMITED PARTNERSHIP; CHEYENNE ASSOCIATES LIMITED PARTNERSHIP; JOHN W. GALSTON; EUGENE H. ROSEN; BRUCE WEINSTEIN; LPIMC, INC.; and INTEGON LIFE INSURANCE CORPORATION,

Defendant(s).

Plaintiffs' Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial is denied.

DONE AND SIGNED this 5th day of February, 1993.

BY THE COURT:

/s/ Robert S. Hyatt
Robert S. Hyatt
District Court Judge